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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 584

CAMELLIA APARTMENTS, INC., THE W & W COMPANY, and UNIVERSITY APARTMENTS, INC., P. O. Box 1188 Decatur, Georgia, *Petitioners,*

v.

THE UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Carl L. Shipley, on behalf of Camellia Apartments, Inc., et al., prays that a writ of certiorari issue to review the decision of the United States Court of Claims in this case.

OPINION BELOW

The opinion of the United States Court of Claims is dated July 17, 1964, U. S. Ct. Cl. No. 344-62, and is set out *infra* in the appendix, page 1a.

JURISDICTION

Jurisdiction of the Supreme Court of the United States is invoked pursuant to Title 28, U. S. Code, Section 1255.

QUESTION PRESENTED

Whether FHA imposition of a 1% prepayment penalty based on the original amount of FHA insured mortgages on petitioners' apartment projects was an arbitrary and capricious abuse of discretion or in violation of FHA regulations or the National Housing Act?

STATUTES INVOLVED

Pertinent provisions of Section 608 of the National Housing Act, and related sections of the Act are as follows:

12 U.S.C. 1738(c):

> * * * In the event that the principal obligation of any mortgage accepted for insurance under this subchapter is paid in full prior to the maturity date, the Commissioner is further authorized in his discretion to require the payment by the mortgagee of an adjusted premium charge in such amount as the Commissioner determines to be equitable, but not in excess of the aggregate amount of the premium charges that the mortgagee would otherwise have been required to pay if the mortgage had continued to be insured under this subchapter until such maturity date; and in the event that the principal obligation is paid in full as herein set forth, the Commissioner is authorized to refund to the mortgagee for the account of the mortgagor all, or such portion as he

shall determine to be equitable, of the current unearned premium charges theretofore paid.

* * *

12 U.S.C. 1742:

The Commissioner is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this subchapter.

FHA REGULATIONS INVOLVED

FHA regulations purporting to comply with the National Housing Act are as follows:

24 C.F.R. 282.4 (1949 ed.): *Prepayment premium charges.*

(a) In the event that the principal obligation of any mortgage accepted for insurance is paid in full prior to maturity, the mortgagee shall within thirty (30) days thereafter notify the Commissioner of the date of prepayment and shall collect from the mortgagor and pay to the Commissioner an adjusted premium charge of one percent (1%) of the original face amount of the prepaid mortgage, except that if at the time of such prepayment there is placed on the mortgaged property a new insured mortgage in an amount less than the original face amount of the prepaid mortgage, an adjusted premium shall be paid based upon the difference between such amounts at the rate applicable as above stated, depending upon the date of prepayment.

(b) In no event shall the adjusted premium exceed the aggregate amount of premium charges

which would have been payable if the mortgage had continued to be insured until maturity.

(c) No adjusted premium shall be collected by the mortgagee in the following cases:

(1) Where at the time of such prepayment there is placed on the mortgaged property a new insured mortgage for an amount equal to or greater than the original face amount of the prepaid mortgage; or

(2) Where the final maturity specified in the mortgage is accelerated solely by reason of partial prepayments made by the mortgagor which do not exceed in any one calendar year fifteen percent (15%) of the original face amount of the mortgage; or

(3) Where the final maturity specified in the mortgage is accelerated solely by reason of payments to principal to compensate for (i) damage to the mortgaged property, or (ii) a release of a part of such property if approved by the Commissioner; or

(4) Where payment in full is made of a delinquent mortgage on which foreclosure proceedings have been commenced, or for the purpose of avoiding foreclosure, if the transaction is approved by the Commissioner; or

(5) Where, at the time of prepayment, there is placed on the property a new insured mortgage less than the original principal amount of the prepaid mortgage: *Provided,* That the Commissioner finds that the collection of such charge would be inequitable under the particular circumstances of the transaction.

Upon such prepayment the contract of insurance shall terminate.

(d) If at the time of prepayment a new insured mortgage is placed on the same property, or if such prepayment is made on or after August 10, 1948, the Commissioner will refund to the mortgagee for the account of the mortgagor an amount equal to the pro rata portion of the current annual mortgage insurance premium theretofore paid which is applicable to the portion of the year subsequent to such prepayment.

STATEMENT

Petitioners are companies organized to own and operate multi-family rental housing built in accordance with the National Housing Act. The Federal Housing Administration had the authority and responsibility during the years 1942-1950 to insure mortgages on multi-family rental housing, per 12 U.S.C.A. 1743, to relieve the housing shortage for veterans. Petitioners built apartment houses under the War Housing Insurance program established by Congress under Section 608 of the National Housing Act on May 26, 1942, which expired on March 1, 1950 (12 U.S.C.A. 1743 and 1738, as amended in 1942 and later).

University Apartments owns 276 rental units built under a construction contract dated January 19, 1950, at 1560 Clairmont Road, Decatur, Georgia, with an FHA insured mortgage of $2,002,500.00. It was refinanced on July 31, 1962, with a $1,300,000.00 mortgage. By then it had paid a total of $115,127.90 to the FHA in mortgage insurance premiums. Nonetheless

the FHA exacted a prepayment penalty of $20,025.00, equal to 1% of the original mortgage.

The W & W Company owns 250 rental units built under a construction contract dated April 4, 1950, at Fort Benning Road, Columbus, Georgia, with an FHA insured mortgage of $1,612,000.00. It was refinanced on November 13, 1957 with a mortgage of $1,100,000.00. By then it had paid a total of $63,692.59 to the FHA in mortgage insurance premiums. Nonetheless the FHA exacted a prepayment penalty of $16,120.00, equal to 1% of the original mortgage.

Camellia Apartments owns 400 rental units built under a contract dated June 25, 1949, at Fort Benning Road, Columbus, Georgia, with an FHA insured mortgage of $2,700,000.00. It was refinanced on November 13, 1957 with a mortgage of $2,000,000.00. By then it had paid a total of $111,536.96 to the FHA in mortgage insurance premiums. Nonetheless the FHA exacted a prepayment penalty of $27,000.00.

Petitioners requested waiver of the said prepayment penalties exacted by FHA in the total sum of $63,145.00, on grounds the penalties were arbitrary and capricious and unlawful in that they violated the letter and purpose of the National Housing Act and FHA regulations. Petitioners requested waiver on grounds it was necessary to obtain funds to rehabilitate the obsolescent properties in order to remain competitive and avoid foreclosure, as provided in FHA rules. The additional 1% of the original mortgages was an unreasonable added cost or penalty and was wholly inequitable. The FHA refused to waive said penalties. Petitioners claimed a legal and equitable right to the return of said unlawfully exacted penalties in a

lawsuit before the United States Court of Claims. In a decision dated July 17, 1964, the Court granted the Government's motion for a summary judgment and dismissed petitioners' claim (Appendix A, infra).

REASONS FOR GRANTING WRIT OF CERTIORARI

This Court has long held that Executive Officers of the national Government must not exceed authority granted by Congress.

Petitioners' apartment projects were built under Section 608 of the National Housing Act (12 U.S.C.A. 1743). Said section incorporated by specific reference those other sections of the National Housing Act intended to apply to apartment projects, e.g., mortgages defined in Section 1736, debenture provisions of Section 1739(d), and property acquisition provisions of Section 1713(k). Significantly, the prepayment penalty authority of Section 1738(c), which provides:

> (c). * * * In the event that the principal obligation of any mortgage accepted for insurance under this subchapter is paid in full prior to the maturity date, the Commissioner is further authorized *in his discretion* to require the payment by the mortgagee of an adjusted premium charge in such amount as the Commissioner determines to *be equitable,* but not in excess of the aggregate amount of the premium charges that the mortgagee would otherwise have been required to pay if the mortgage had continued to be insured under this subchapter until such maturity date; * * * (emphasis added)

is not included among specific references to applicable sections set out in Section 608 (12 U.S.C.A. 1743), and is thus excluded in accordance with the accepted rule of construction *(inclusio unius est exclusio alterius)*. Further, Section 1738 was enacted on March 28, 1941, while Section 1743 did not become law until May 26, 1942, making the reference to the subchapter inapplicable. Later amendments of both Sections 1738 and 1743, although numerous, did not incorporate in Section 1743 the cited authority to exact a prepayment penalty.

Not only did the FHA have no authority under Section 1743 of the National Housing Act to exact from plaintiffs $63,145.00 in adjusted premium charges or prepayment penalties, but the Commissioner's statutory discretion, assuming he did have lawful authority, was exercised arbitrarily without reference to a rule of reason or the purpose of the statute. Not only was the FHA Commissioner required to exercise his discretion in a "non-arbitrary" manner, *Crosley Corp.* v. *Westinghouse*, 130 F. 2d 474, 475; *Pugit Sound Power* v. *Public Utility District*, 123 F. 2d 286, 293; but the statute itself required a determination that the prepayment penalty be "equitable." No such determination was ever made on the basis of substantial evidence.

Section 608 was enacted by Congress for a narrow and specific purpose—to provide emergency housing "for veterans of World War II and their immediate families, and for hardship cases." (12 U.S.C.A. 1743 (b)(2). The housing shortage sought to be remedied by Section 608 has long since disappeared, and the FHA is reporting vacancy rates as high as 40% in

some parts of the United States today. Veterans and their families have adequate shelter in all types of housing, both conventional and FHA insured under other FHA programs. The situation Section 608 was intended to remedy has been remedied.

Public policy requires that Section 608 apartment projects be restored to the private sector of the economy at the earliest practicable time, consistent with the statutory purpose. FHA authority to insure mortgages under Section 608 expired under the law on March 1, 1950. Emergency veterans housing is inconsistent with the American theory of a free competitive market. Under Section 608 the FHA Commissioner was given extraordinary emergency authority to require owner-mortgagors "to be regulated or restricted as to rents or sales, charges, capital structure, rate of return, and methods of operation." The projects operate with rent ceilings and all of the other trappings of a wartime economy. Despite the fact that the program expired 14 years ago, and no housing emergency exists, the FHA Commissioner arbitrarily and capriciously exercised his discretion to impose a 1% prepayment penalty on plaintiffs to discourage conventional refinancing and force plaintiffs and others similarly situated (from 1942 to 1950 FHA insured mortgages on 465,674 apartment units in over 7,000 projects) to continue under the FHA program contrary to public policy and the statutory purpose.

The FHA Commissioner promulgated the following regulation with respect to imposition of a 1% penalty upon prepayment of an FHA insured mortgage:

> Rule 64205.2b, Part C, Project Mortgage Servicing (24 C.F.R. 282.4)

"All Section 608 Mortgages and All Other Mortgages Except Sections 207 and 213 for Which Commitments Were Issued Before July 13, 1954: In the event that the principal obligation of any mortgage accepted for insurance is paid in full prior to maturity, the mortgagee shall within thirty (30) days thereafter notify FHA of the date of prepayment and shall, except with respect to a mortgage covering a release clause project, collect from the mortgagor and pay to FHA an adjusted premium charge of one per centum (1%) of the original face amount of the prepaid mortgage; except that if at the time of any such prepayment there is placed on the mortgaged property a new insured mortgage in an amount less than the original face amount of the prepaid mortgage, an adjusted premium shall be paid based upon the difference between such amounts.

(1) In no event shall the adjusted premium charge exceed the aggregate amount of premium charges which would have been payable if the mortgage had continued to be insured until maturity.

(2) No adjusted premium charge shall be due FHA in the following cases:

(a) Where at the time of such prepayment, there is placed on the mortgaged property a new insured mortgage or mortgages for an amount equal to or greater than the original principal amount of the prepaid mortgage; or

(b) Where the final maturity specified in the mortgage is accelerated solely by reason of

partial prepayments made by the mortgagor which do not exceed in any one calendar year 15 percent of the original face amount of the mortgage; or

(c) Where the final maturity specified in the mortgage is accelerated solely by reason of payments to principal to compensate for damage to the mortgaged property, or a release of a part of such property, is approved by the Commissioner; or

(d) Where payment in full is made of a delinquent mortgage on which foreclosure proceedings have been commenced, or for the purpose of avoiding foreclosure, if the Commissioner, in his discretion, agrees in writing to waive the payment thereof; or

(e) Where, at the time of such prepayment, there is placed on the property a new insured mortgage or mortgages less than the original principal amount of the prepaid mortgage; *provided,* that the Commissioner finds that the collection of such charge would be inequitable under the particular circumstances of the transaction."

Said regulation sets forth no basis for the 1% penalty, no findings or showing that the discretionary imposition of a 1% penalty is related to administrative costs, will serve the public interest, is necessary to implement the statutory purpose, or bears any relationship to a fair and equitable administration of the law, or is "equitable" as required by 12 U.S.C.A. (1738 (c)). The 1% penalty is not based on the need for in-

surance premiums for risks or expenses. There is no actuarial or administrative basis for the FHA to exercise its discretion in favor of a 1% prepayment penalty in the instant case. The statute implies that the 1% or less prepayment penalty would be the exception, not the rule, and only imposed after a specific determination of equitableness. The FHA has operated just the reverse. The FHA reported in its 28th Annual Report, page 111, that it has an "excess of insurance reserves over estimated reserves requirements of $141,943,153.00" in the War Housing Insurance Fund, and explains the situation as follows:

> "A balance status for a fund exists when its insurance reserves are equal to or greater than the the estimated reserve requirements. When a balance status is attained, the fund has sufficient resources to meet such future insurance losses and expenses as might be incurred in the event that adverse economic conditions of approximately depression magnitude were to develop immediately."

In its official report FHA states it has $2,752,343,517.00 insurance in force in the War Housing Insurance Fund with insurance reserves of $203,209,895.00 against which estimated reserve requirements are $61,266,742.00—an excess of reserves over requirements of nearly $142 million as set out hereinabove. Plaintiffs have already paid a total of $290,359.45 to FHA in insurance premiums which helped create the cited excess of reserves above requirements for losses and expenses. Nonetheless, FHA arbitrarily imposed the additional 1% amounting to $63,154.00, despite its own rule providing that no such penalty should be

exacted under circumstances set out in subparagraphs (b) and (d) of its adjusted premium regulation.

Even if the FHA Commissioner is held to be authorized to exact a prepayment penalty, such adjusted premium or prepayment penalty, like the insurance premium itself, must meet the statutory standard of being "for the carrying out of the provisions of this title," i.e., to create reserves and meet expenses of the War Insurance Fund (Section 602 of the Act, 12 USCA 1737). In addition, Section 603 of the Act, (12 USCA 1738) would require the Commissioner only to exact a prepayment penalty when "in his discretion" the adjusted premium meets the statutory standard of being "in such amount as the Commissioner determines to be equitable." The 1% penalty exacted from plaintiffs was not equitable, was not based on a need to create insurance reserves, or to meet expenses, or for carrying out the provisions of Title VI, and the Commissioner made no findings to determine the equitableness of the amount of the total sum paid by plaintiffs. The imposition was wholly arbitary, not based on reason or need, and contrary to the statutory safeguards and standards. A regulation which creates a rule out of harmony with a statute is a nullity. *U. S.* v. *Eddy Bros., Inc.*, 291 F. 2d 529; *American Broadcasting Co.* v. *U. S.*, 110 F. Supp. 374, Aff'd 347 U.S. 284.

No public hearing or other opportunity to participate in the making of said rule was given, despite the requirements of the Administrative Procedure Act (5 USCA 1003). The FHA made no factual finding for its refusal to waive the $63,145.00 in prepayment penalties imposed on plaintiffs, despite their claim that said prepayment was necessary to avoid foreclosure, as provided in said rule, all of which was an arbitary and

capricious refusal to abide by the FHA's own rule against enacting a prepayment penalty in such circumstances. *Atwood's Transport Lines, Inc.* v. *U. S.*, 211 F. Supp. 168, Aff'd 373 U.S. 377.

The FHA regulation, assuming it was lawfully promulgated and consistent with the National Housing Act, provides in terms that the prepayment penalty shall not be due FHA "where the final maturity specified in the mortgage is accelerated solely by reason of partial prepayments made by the mortgagor which do not exceed in any one calendar year 15 percent of the original face amount of the mortgage." Plaintiffs' mortgages were more than 6⅔ years old at the time of prepayment. The FHA was arbitrary and capricious in not giving cumulative effect to its own rule—it is implicit in the rule that prepayment of 15% a year or 100% after 6⅔ years should be treated the same for purposes of the rule, as any administrative cost or work in processing such prepayment would be proportionately less. Failure to give a reasonable application of the regulation by the FHA was unlawful in the absence of any evidence showing a reasonable basis for such action within the stated purposes of the Act.

The decision below errs in ignoring the general rule stated by this Court that "discretion" must be exercised reasonably and non-arbitrarily. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 71 S. Ct. 624, 95 L. ed. 817.

The decision below errs in ignoring the rule that where a statute contemplates an administrative decision on a case by case basis, an agency cannot meet its obligation by promulgating a rule of general applicability. See Administrative Procedure Act, 5 U.S.C.A.

1003, 1004, 1006, 1008; *N.L.R.B.* v. *A.P.W. Products Co.*, 316 F. 2d 899. Certainly at the very least, petitioners were entitled to a determination of equitableness as to the prepayment penalty in their specific cases. Finally, under any view of the statute or the FHA regulations, petitioners were entitled to a waiver of 15% of the $63,145.00 prepayment penalty —a sum of $9,471.00.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted. There is no avenue of relief from erroneous decisions of the U. S. Court of Claims except this Court. 28 U.S.C.A. 1255.

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Ex. 1a

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 344-62

(Decided July 17, 1964)

CAMELLIA APARTMENTS, INC., THE W & W COMPANY, UNIVERSITY APARTMENTS, INC.

v.

THE UNITED STATES

Carl L. Shipley for plaintiffs. *Shipley, Akerman & Pickett* were on the briefs.

Joan T. Berry, with whom was *Assistant Attorney General John W. Douglas*, for defendant.

Before JONES, *Senior Judge*, WHITAKER, LARAMORE, DURFEE and DAVIS, *Judges*.

ON PLAINTIFFS' MOTION AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

WHITAKER, Judge, delivered the opinion of the court:

The plaintiffs are three corporations which own and operate apartment houses located in the State of Georgia.[1]

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[1] Plaintiff Camellia Apartments, Inc. owns 400 rental units located in Columbus, Georgia. This building was constructed in 1949 with an FHA-insured mortgage of $2,701,000. Plaintiff The W & W Company owns 250 rental units located in Columbus, Georgia. This building was built in 1950 with an FHA-insured mortgage of $1,612,000. Plaintiff University Apartments, Inc. owns 276 rental units located in Decatur, Georgia. This building was constructed in 1950 with an FHA-insured mortgage of $2,002,500.

The buildings, which were designed for rent to war workers, were constructed with fiancing supplied through mortgages insured by the Federal Housing Administration pursuant to section 608 of the Federal Housing Act.[2]

After plaintiffs had owned the apartment buildings for some time, they obtained commitments to refinance their properties under conventional mortgages that were not FHA-insured. The Commissioner of the Federal Housing Administration, as a prerequisite to giving his assent to the refinancing, required plaintiffs to pay a "prepayment premium charge" equal to one percent of the original face amount of the mortgages. Plaintiffs paid these sums to their respective mortgagees, who transmitted them to the FHA. Each of them now sues to recover the amount of the prepayment charge, alleging that it was not authorized by statute or, if so authorized, was exacted in violation of the FHA's regulations and was therefore illegal.

The question thus posed is whether, under the National Housing Act or the regulations issued pursuant thereto, the Commissioner properly required plaintiffs to pay this "prepayment premium charge" for refinancing their mortgages.

Before we can reach these questions, however, we must first deal with defendant's contention that we lack jurisdiction over this suit. Defendant argues that, since plaintiffs mortgaged their properties to private financial institutions and paid the prepayment charges to these same institutions, there was neither privity of contract nor any other formal legal relationship between the parties to this suit. Plaintiffs have no right to sue, says defendant, in the absence of a contractual obligation running from the FHA to the plaintiffs.

Plaintiffs' claim, however, is not based upon any contractual obligation. Although each of the mortgages contained a clause requiring the payment of any prepayment

[2] 56 Stat. 301, 303 (1942), 12 U.S.C. § 1743 (1958).

charge to the mortgagee, the gravamen of the petition is that the charges were exacted on behalf of the FHA, in violation of a statute and by virtue of the misconstruction of an administrative regulation. Under 28 U.S.C. § 1491, we are given jurisdiction of actions founded upon Acts of Congress or founded upon regulations of executive departments. The FHA regulations required the inclusion in the mortgages of the provision for the prepayment premium charge. The fact that the FHA acted through the mortgagees in requiring the payments of which plaintiffs complain is immaterial; under the pertinent regulation, the mortgagees were required to collect these funds and to remit them to the Commissioner.[3] Therefore, we do not think that defendant can seriously deny plaintiffs' allegation that the mortgagees acted solely as the FHA's agents in so doing. It is clear that they had no financial interest of their own in the prepayment charges.

When one of the plaintiffs, University Apartments, Inc., requested permission to refinance without penalty, moreover, it dealt directly with the FHA, and the agency denied permission in a letter sent directly to University. It did not insist, as defendant now does, that there was no legal relationship between it and this property-owner; it viewed the charge as payable directly into its coffers and insisted upon it. Its position then was that the payment was required by its regulation, a regulation it deemed authorized under the statute. In these circumstances, we do not think that defendant can deny the direct impact of that regulation and the underlying statute upon the plaintiffs. Plaintiffs' suit, therefore, is "founded upon an Act of Congress" and is within our jurisdiction because it seeks recovery of an allegedly illegal exaction by officials of the Government purporting to act under a power conferred by Congress. *Clapp* v. *United States*, 127 Ct. Cl. 505, 117 F. Supp. 576, *cert. denied*, 348 U.S. 834 (1954).

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[3] See 24 C.F.R. § 282.4 (1949), quoted in pertinet part at pp. 4-5, *infra*.

We come now to the principal question before us: whether the FHA had power to require the payment of prepayment charges of one percent and whether that power was validly exercised in this case.

It seems indisputable that Congress conferred upon the Commissioner the authority to make such a charge. Section 603(c) of the National Housing Act[4] authorized him to fix a premium for the insurance of mortgages under title VI of the Act of between one and one-and-one-half percent of the principal amount of the mortgage and to require the payment of that premium into the fund from which insurance payments were to be made. That section further provides:

> In the event the principal obligation of any mortgage accepted for insurance under this title is paid in full prior to the maturity date, the Administrator is further authorized in his discretion to require the payment by the mortgagee of an adjusted premium charge in such amount as the Administrator determines to be equitable * * *

It is apparent on the face of the statute that the authority to demand a prepayment charge from certain mortgagees included within its scope the mortgagees that had financed plaintiffs' properties. Those properties were constructed and the mortgages were issued under section 608 of the Act, which is also a part of title VI. Even though section 608 was enacted a year later than section 603, authorizing the premium for prepayment, the provisions of the latter are applicable to the former. Section 608 merely added a new type of mortgage for which FHA insurance was authorized. It did not contain administrative provisions for the handling of the new type of mortgages, since those provisions were already in force as part of section 603, which was intended to cover any program under title VI. Furthermore, after the enactment of section 608, Congress made signifi-

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[4] 55 Stat. 55, 57 (1941), 12 U.S.C. § 1738(c) (1958).

cant amendments to section 603(c) but did not make the provision for prepayment charges inapplicable to mortgages issued under section 608. See section 10(d) of the Veterans' Emergency Housing Act of 1946, 60 Stat. 207, 213.

Under section 603(c), the Administrator was given a broad discretion: he was permitted to charge a prepayment premium in such amount as he thought "equitable". Under this authority and under the authority of section 607, which empowered him "to make such rules and regulations as may be necessary to carry out the provisions of this title" (55 Stat. at 61, 12 U.S.C. § 1742 (1958)), the Commissioner[5] laid down the following regulation, which was applied in plaintiffs' cases:

> *Prepayment premium charges.* (a) In the event that the principal obligation of any mortgage accepted for insurance is paid in full prior to maturity, the mortgagee shall within thirty (30) days thereafter notify the Commissioner of the date of prepayment and shall collect from the mortgagor and pay to the Commissioner an adjusted premium charge of one percent (1%) of the original face amount of the prepaid mortgage, except that if at the time of any such prepayment there is placed on the mortgaged property a new insured mortgage in an amount less than the original face amount of the prepaid mortgage, an adjusted premium charge shall be paid based upon the difference between such amounts at the rate applicable as above stated, depending upon the date of prepayment.
>
> (b) In no event shall the adjusted premium exceed the aggregate amount of the premium charges which

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[5] By section 3 of Reorganization Plan No. 3 of 1947, 61 Stat. 954, the title of the Federal Housing Administrator was changed to that of Federal Housing Commissioner, and the Commissioner took charge of the duties of the Administrator.

would have been payable if the mortgage had continued to be insured until maturity.

(c) No adjusted premium charge shall be collected by the mortgagee in the following cases:

(1) Where at the time of such prepayment there is placed on the mortgaged property a new insured mortgage for an amount equal to or greater than the original face amount of the prepaid mortgage; or

(2) Where the final maturity date specified in the mortgage is accelerated solely by reason of partial prepayments made by the mortgagor which do not exceed in any one calendar year fifteen percent (15%) of the original face amount of the mortgage;

* * * * *

24 C.F.R. § 282.4 (1949).

Plaintiffs say that this regulation was unlawful in that it violated the Congressional mandate that prepayment charges must be "equitable" in amount. They argue that the only proper function of such a charge is to reimburse the insurance fund for the expenses of processing mortgage insurance and to defray the risk attendant upon the issuance of insurance. The gist of their contention is that the FHA must waive any part of the prepayment charge that it does not need to cover such expenses and risks.

We think that plaintiffs have given too narrow a scope to the factors that the Commissioner could take into account in deciding whether to require a prepayment charge and how much it should be. The basic statutory authority for the FHA to carry on a program of mortgage insurance carries with it the obligation of that agency to operate a financially sound program. Any person familiar with real estate financing knows that one of the primary purposes of a prepayemnt premium is its deterrent effect. As interest rates and the quality of risks fluctuate, there is at work something we might call a Gresham's Law of mortgages.

Having assumed the position of an insurer of the economic stability of mortgagors, the Government might properly act to prevent a situation in which the risks it insures are only those that are marginal or worse. The FHA could, we think, deter mortgagors whose loss potential was relatively slight from turning to private financing, leaving it with only those mortgages that had no appeal to non-insured lenders. The Commissioner might properly prefer possession of a mixed bag to being left holding an empty one—not literally empty, but filled only with culls.[6]

Accordingly, we are not impressed by plaintiffs' argument that the insurance fund was more than ample to cover any foreseeable risks, even those that would arise in the event of a severe depression. That fund was generated by prior premium payments by mortgagors situated similarly to plaintiffs, including payments exacted under this regulation. Plaintiffs now seek to benefit because those payments helped to build up a large fund. Putting to one side the question whether the problem of an inordinately large fund is, in reality, one for Congress to resolve, the fact remains that not the least of the elements of a program designed to be "equitable" is that persons in like circumstances receive like treatment. The FHA did not require plaintiffs to do anything more than was required of other mortgagors who wished to refinance. Indeed, it is plaintiffs who seek preferred treatment, since they seek to benefit from the payments made by others. We conclude that the Commissioner was well within his rights to require

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[6] The regulation permitted a waiver of all or a part of the prepayment premiums in the event the prepaid mortgage was replaced with another insured one. Presumably, in such a case, the FHA was willing to forego the charge to the extent it retained the risk that the mortgagor and his property represented. This lends further support to our conclusion that the Commissioner's purpose in requiring the prepayment premium was to deter sound mortgagors from leaving his fold rather than simply to compensate the agency for any out-of-pocket loss it might sustain by reason of acceleration.

plaintiffs to make payments on the same basis as other mortgagors.

For the same reason, we must reject plaintiffs' contention that the Commissioner shirked his duty in deciding their cases under a general regulation and by failing to accord them an evidentiary hearing.

Plaintiffs' alternative line of attack is that the FHA wrongly construed its regulation by refusing to give cumulative effect to the provisions of paragraph (c)(2) thereof, which permits prepayment without payment of a premium in amounts "which do not exceed in any one calendar year fifteen percent (15%) of the original face amount of the mortgage." Plaintiffs argue that, since they were entitled to prepay 15 percent per year and since their mortgages were more than 6⅔ years old, they could, without payment of any charge, liquidate their indebtedness in full at any time. The difficulty with this argument is that it ignores both the clear language of the regulation and the policy behind it. Paragraph (c)(2), by its terms, applies only to "partial prepayments" of not more than 15 percent of the mortgage principal made *"in any one calendar year."* [Emphasis added.] Since plaintiffs paid more than the maximum permissible amount in one such year, they do not come within the terms of this exception.

As we have previously noted, one purpose of this regulation is to insure that the FHA's portfolio remains a balanced one, that it does not consist entirely of mortgages which, because of their speculative character or unusually high degree of risk, are unattractive to lenders that lack insurance commitments. Paragraph (c)(2) of the regulation was not, in short, intended to permit ready and cheap refinancing of precisely those mortgages which the Commissioner was most anxious to retain. It was not intended that the 15 percent limitation on prepayments should be cumulative.

It is true that under paragraph (c)(2) a mortgagor was privileged to prepay up to 15 percent of the face amount of the mortgage each year without paying a premium. The existence of this privilege, however, does not detract from the general policy behind the regulation. To the extent that payments are accelerated, the mortgagor's equity increases in size, and this may well be a desirable objective for its own sake. A mortgage that is partially prepaid, moreover, is a less risky proposition than one that bears a greater burden of debt. The ability to prepay is substantial evidence of the financial solidity of the mortgagor, and the Commissioner, in line with his general policy of upgrading his portfolio, might reasonably have desired to obtain and retain such a risk. This policy and these objectives, of course, have no application to a prepayment—at whatever stage of the life of the mortgage—that is made pursuant to complete refinancing, which would remove the mortgage from the FHA's pool of risks.

We therefore conclude that the FHA's regulation was valid and was properly applied to these plaintiffs. They are not entitled to recover.

Plaintiffs' motion for summary judgment is denied, and defendant's cross-motion for summary judgment is granted. The petition is dismissed.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 584

CAMELLIA APARTMENTS, INC., ET AL., *Petitioners*

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners are three corporations which own and operate multi-family rental housing developments in the State of Georgia. Each was constructed pursuant to the War Housing Insurance Program and was financed by mortgages insured by the Federal Housing Administration under Section 608 of the National Housing Act, 12 U.S.C. 1743. In applying for and securing mortgage insurance under that provision, petitioners expressly accepted liability for "the adjusted premium charge referred to in Section 2, Article III of the applicable regulations for Section 608." Those

regulations in substance provide for the assessment of a prepayment premium or one percent of the original face amount of the mortgage, in the event that an insured mortgage is paid in full prior to maturity. 24 C.F.R. 282.4 (1949 ed.), Pet. 3-5.

After several years petitioners obtained commitments for conventional refinancing of their multifamily developments. Before the Commissioner of the Federal Housing Administration approved the release of petitioners from their insured mortgages he required that they comply with the premium adjustment provision which had been incorporated into their contracts of insurance. Petitioner University Apartments, Inc. objected to the assessment of that premium adjustment and applied for a waiver pursuant to 24 C.F.R. 282.4. After the Commissioner refused that request,[1] University paid the one percent prepayment premium. Petitioners Camellia Apartments, Inc., and the W & W Company paid the charge without requesting a waiver.

Notwithstanding their voluntary assumption of liability for the adjusted premium charge in the event that their mortgages were paid in full prior to maturity, petitioners instituted this action challenging the statutory authority of the Commissioner of the Federal Housing Administration to assess premium adjustment charges and, assuming such authorization, the validity of the exactions in their particular cases. The Court of Claims carefully considered and properly rejected each of petitioners' attacks.

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[1] In an action instituted on December 20, 1961, in the district court for the District of Columbia, University sought, in effect, to mandamus the Commissioner to grant a waiver. On June 1, 1962, the court dismissed the complaint on the merits.

1. The Commissioner plainly has statutory authority to impose a premium adjustment charge in instances where a mortgage insured under the War Housing Insurance provisions of the National Housing Act is liquidated in full prior to its date of maturity. The authorization to fix such a charge is explicitly set forth in Section 603(c) of the Act (12 U.S.C. 1738):

> * * * In the event that the principal obligation of any mortgage accepted for insurance under this title is paid in full prior to the maturity date, the Commissioner is further authorized in his discretion to require the payment by the mortgagee of an adjusted premium charge in such amount as the Commissioner determines to be equitable * * *.

While recognizing the Commissioner's authority to impose prepayment charges, petitioners contend that that authority does not extend to mortgages insured under Section 608 of the Act which, they point out, does not specifically incorporate Section 603 (Pet. 7-8). But the language of Section 603 plainly makes it applicable to any mortgage accepted for insurance under the War Housing Insurance subchapter, and petitioners' mortgages, which were insured under Section 608, concededly are within this category.

2. Congress authorized the Commissioner "to make such rules and regulations as may be necessary to carry out the provisions of this title." 12 U.S.C. 1742. Petitioners attack the Commissioner's regulations imposing a prepayment premium of one percent of the face amount of the mortgage on the ground that this charge exceeds what is necessary to defray the actual expenses incurred by the insurance fund in processing and administering each particular mortgage and is

therefore not "equitable" within the meaning of Section 603(c) of the statute. As the court below observed, to construe so rigidly the operative Congressional mandate would seriously frustrate the Federal Housing Administration's ability to operate in a sound business fashion. Moreover, Congress plainly intended the Commissioner to exercise the broadest possible discretion in arriving at the prepayment charge he would require as a term of the guarantee contract. The only statutory limitation is that the adjusted premium charge not exceed "the aggregate amount of the premium charges that the mortgagee would otherwise have been required to pay if the mortgage had continued to be insured under this section until such maturity date." 12 U.S.C. 1738(c). The Commissioner was, of course, intended to demand this contract term on a uniform basis. To insist, as petitioners do, that the adjusted premium charge must be determined *ad hoc* in each case would not only be unworkable; it would also be highly inequitable.[2]

3. Equally without substance is petitioners' contention that they should have been afforded the benefit of a provision of the regulations (24 C.F.R. 282.4(c)(2) (1949 ed.), Pet. 4) which allows prepayment, without charge, of not more than 15% of the original face amount of the mortgage in any one calender year. Petitioners argue that, since a mortgagor can fully discharge his mortgage obligation by annual prepayments of 15% of its face amount over 6 2/3 years without incurring a prepayment charge, they should

[2] Petitioners' argument that the Commission violated the Administrative Procedure Act (Pet. 14-15) falls with its premise that the statute requires determination of the prepayment premium in each individual case.

be allowed to prepay the full amount in one year and have it treated as if it were repaid over the last 6 2/3 years. Their argument is fully answered by the language of the regulation. As the court below observed, the regulation "by its terms, applies only to 'partial prepayments' of not more than 15 percent of the mortgage principal made *'in any one calendar year.'* [Emphasis added.] Since [petitioner] paid more than the maximum permissible amount in one such year, they do not come within the terms of this exception." (Pet. 8a).[3]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

DECEMBER 1964.

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[3] The exception for partial prepayments reflects in part the benefit resulting to the government. Partial prepayments improve the quality of the Administration's holdings; they reduce the Administration's risk by increasing the mortgagor's equity. A complete prepayment in a single year eliminates the loan, and its premiums, entirely; it in no way improves the overall quality of the loans guaranteed by the Administration.

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